

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FIRST BANK OF DELAWARE, INC.,)
)
Plaintiff,)
) C.A. No. N11C-08-221 MMJ
v.) CCLD
)
)
FIDELITY AND DEPOSIT)
COMPANY OF MARYLAND,)
)
Defendant.)

Submitted: November 13, 2013
Decided: December 4, 2013

On Defendant Fidelity and Deposit Company of Maryland's
Motion for Reargument of the October 30, 2013 Opinion

DENIED

ORDER

Lisa C. McLaughlin, Esquire, Phillips, Goldman & Spence, P.A., William J. Carter,
Esquire, Kelly M. Lippincott, Esquire, Carr Maloney P.C., Attorneys for Plaintiff

William R. Firth, III, Esquire, Anthony R. Twardowski, Esquire, Philip A. Magen,
Esquire, Zarwin, Baum, DeVito, Kaplan, Schaer & Toddy, P.C., Attorneys for
Defendant

JOHNSTON, J.

1. By opinion dated October 30, 2013, the Court held:

First Bank has met its initial burden of demonstrating that the Policy language in Section 4 provides coverage for the \$1,236,839.99 and \$151,539.20 Visa assessments, and the \$88,216 MasterCard assessment. The assessments are defined Electronic Risk Claims, arising out of a defined Loss Event, and DAS computers were used “on behalf of” First Bank.

In turn, Fidelity has demonstrated that Exclusion M applies, by showing that the assessments “arise from” the fraudulent use of data. First Bank’s failure to ensure PCI DSS compliance also may be a basis for the assessments.

However, the Court is persuaded that First Bank has met its burden of proving that an exception exists that precludes application of Exclusion M. The Court finds that Exclusion M (for fraud) would render illusory the coverage for unauthorized data use.

THEREFORE, First Bank’s Motion for Summary Judgment is hereby **GRANTED**. First Bank is entitled to damages in the amount of \$1,000,000.¹ Fidelity’s Motion for Summary Judgment is hereby **DENIED**. Because the Court has found no genuine issue of material fact, and has relied on cross-motions for summary judgment, Fidelity’s Motion to Strike Plaintiff’s Expert Witnesses is hereby **DENIED AS MOOT**.

2. Defendant Fidelity and Deposit Company of Maryland has moved for reargument. Fidelity asserts that the Court misapprehended the law and relevant facts when it found that “applying Exclusion M would swallow the coverage granted under Section 4.III(L)(1) for ‘any unauthorized use of, or unauthorized access to electronic data...with a computer system.’...[I]n the context of this Policy,

¹The Section 4 Policy limit is \$1,000,000.

all unauthorized use could be, to some extent, fraudulent.” Fidelity contends that access can be authorized, and yet not involve fraud.

3. The purpose of moving for reargument is to seek reconsideration of findings of fact, conclusions of law, or judgment of law.² Reargument usually will be denied unless the moving party demonstrates that the Court overlooked a precedent or legal principle that would have a controlling effect, or that it has misapprehended the law or the facts in a manner affecting the outcome of the decision. “A motion for reargument should not be used merely to rehash the arguments already decided by the Court.”³

4. The Court has reviewed and considered all submissions. During oral argument on the underlying cross motions for summary judgment, Fidelity presented the precise argument that is the subject of this Motion. The reasons for the Court’s rulings are set forth in its Opinion. The Court did not overlook a controlling precedent or legal principle, or misapprehend the law or the facts in a manner affecting the outcome of the decision.

THEREFORE, Defendant’s Motion for Reargument is hereby DENIED.

²*Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (1969).

³*Wilmington Trust Co. v. Nix*, Del. Super., 2002 WL 356371, Witham, J. (Feb. 21, 2002); *Whitsett v. Capital School District*, Del. Super., C.A. No. 97C-04-032 Vaughn, J. (Jan. 28, 1999); *Monsanto Co. v. Aetna Casualty & Surety Co.*, Del. Super., C.A. No. 88-JA-118, Ridgeley, P.J. (Jan. 14, 1994).

The parties shall confer to present an implementing order for the Court's consideration by December 13, 2013. If the parties cannot agree as to a draft form of order, the Court will consider competing forms of order submitted by December 20, 2013.

IT IS SO ORDERED.

/s/ *Mary M. Johnston* _____

The Honorable Mary M. Johnston